Office-Supreme Court, U.
FILED
OCT 22 1953
HAROLD B. WILLEY, Cl

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

NO. 369

KEYSTONE METAL COMPANY, Petitioner,

v.

CITY OF PITTSBURGH, JAMES P. KIRK, Treasurer of the City of Pittsburgh, SCHOOL DISTRICT OF PITTSBURGH, et al., etc., Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ANNE X. ALPERN,
Solicitor, City of Pittsburgh
J. FRANK MCKENNA, JR.,
Assistant Solicitor, City of Pittsburgh
MORTIMER B. LESHER,
Solicitor, School District of Pittsburgh
OSCAR G. PETERSON,
Assistant Solicitor, School District of Pittsburgh.
NILES ANDERSON,
Assistant Solicitor, School District of Pittsburgh,

SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BLVD. OF ALLIES, PITTSBURGH 19, PA.

INDEX TO BRIEF.

		PAGE
1.	This Is Not a Case In Which Petitioner May Properly Invoke the Jurisdiction of This Court	1
2.	The Petition Discloses No Exceptional Circumstances Whatsoever	2
3.	The Questions Presented by Petitioner Do Not Portray the True Factual and Legal Situation	3
4.	Petitioner Does Not Present a Federal Question of Substance Which Has Not Heretofore Been Determined by This Court	8
	a. The Commerce Clause Does Not Prohibit the Tax Imposed	10
	b. Interstate Commerce May Be Made to Pay Its Own Way	12
	(1) The Supreme Court of Pennsylvania Properly Decided This Question	12
	(2) No Tax Upon the Transaction by a Sister State Would Be Related to the Sales Transaction Upon Which Alone the Instant Taxes Are Based	16
	(3) The Questions Are Not of First Impression in This Court	19
Conclusion		22

TABLE OF CASES

J. D. Adams v. Storen, 304 U.S. 307, 58 S. Ct. 913 (1938) 7

Capital Greyhound Lines v. Brice, 339 U.S. 542, 70 S. Ct. 808 (1950) 9, 10

Central Greyhound Lines v. Mealey, 334 U.S. 658, 68 S. Ct. 1263 20

PAGE

City of Chicago v. Willett Co., ... U.S. ...., 73 S. Ct. 460 (1953) 21

Crew Levick Co. v. Pennsylvania, 245 U.S. 292 (1917) 7

Freeman v. Hewit, 329 U.S. 249, 67 S. Ct. 274 (1947) 7, 10, 11, 12, 17, 20, 21

Gwin, White & Prince v. Henneford, 305 U.S. 434, 59 S. Ct. 325 (1939) 7, 21

International Harvester Co. v. Dept. of Treasury, 322 U.S. 340, 64 S. Ct. 1019 (1944) 12, 13, 20

Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 662, 69 S. Ct. 1264 (1949) 16, 18, 20

Keystone Metal Co. v. City of Pittsburgh, 374 Pa. 323, 97 A. 2d 797.....7, 12

Lawrence v. State Tax Commission, 286 U.S. 276 (1932) 16

McCleod v. J. E. Dilworth Co., 322 U.S. 327, 64 S. Ct. 1023 (1944) 8, 12

McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 60 S. Ct. 388 (1940) 11

Norton v. Dept. of Revenue of Illinois, 340 U.S. 534, 71 S. Ct. 377 (1951) 13, 18, 19, 20

Puntureri v. School District of Pittsburgh, 359 Pa. 596, 60 A. 2d 42 (1948) 6

Robertson v. People of State of California, 328 U.S. 440, 66 S. Ct. 1160 21

Spector Motor Service v. O'Connor, 340 U.S. 602, 71 S. Ct. 508 (1951) 14, 20

PAGE

State of Wisconsin v. J. C. Penney Co., 311 U.S. 435, 61 S. Ct. 246 (1940) 14, 15, 21

Western Livestock v. Bureau of Revenue, 303 U.S. 250, 58 S. Ct. 546 (1938) 11, 13, 14, 17, 20

TABLE OF STATUTES.

Act of June 20, 1947, P.L. 745 .....3, 4, 5

Ordinance No. 488, of 1947, City of Pgh. 3, 4, 5

MISCELLANEOUS.

United States Constitution, Art. I, Sec. 8, Cl. 3 .....5, 7, 9, 10, 11, 12, 13, 14, 15

United States Constitution, Art. I, Sec. 10, Cl. 2 .....5, 7, 12, 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

NO. 369

KEYSTONE METAL COMPANY, Petitioner,

v.

CITY OF PITTSBURGH, JAMES P. KIRK, Treasurer of the City of Pittsburgh, SCHOOL DISTRICT OF PITTSBURGH, et al., etc., Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully submit that the prayer of the Petition for Writ of Certiorari should not be granted, for the following reasons:

1. This is not a case in which petitioner may properly invoke the jurisdiction of this Court.

Petitioner did, indeed, raise the question in the trial court, the court *en banc* and the Supreme Court of Pennsylvania. The same action has been taken by scores of other taxpayers who have asserted complete or partial non-liability for the mercantile taxes of the School District of Pittsburgh under an Act of Assembly and the City of Pittsburgh under a City Ordinance. In all cases, as in this, the local (Allegheny County) and Appellate Courts, regardless of their decisions, have, as will be shown more specifically hereinbelow, considered

the constitutional question thus raised. In so doing, they have considered, in the light of constitutional provisions, congressional enactments and decisions of this Court, whether or not in the individual case, these local taxes imposed an undue or prohibited burden upon or interference with interstate commerce.

Respondents do not question the general principle that this Court, in the exercise of its discretion, takes jurisdiction where the validity of a state statute under federal law, as construed and applied by the highest court of a state is challenged. Respondents submit, however, that under the decisions of this Court, such discretionary acceptance of jurisdiction will be made only in proper cases, such as, *inter alia*:

a. exceptional circumstances;

b. where jurisdiction appears affirmatively upon the record;

c. where a federal question of substance, not theretofore determined by this Court, is involved.

For reasons like these such discretionary power will be sparingly exercised.

2. The petition discloses no exceptional circumstances whatsoever.

Whether or not jurisdiction appears affirmatively upon the record requires no extended discussion inasmuch as the record speaks for itself; Respondents submit that it does not. Respondents further submit that the petition submits no federal question of substance not heretofore determined by this Court. Consequently,

Respondents submit that this Court cannot herein take jurisdiction, wherefore the petition should be dismissed. The argument which follows attempts to support Respondents' position.

3. The Questions Presented (two in number) by petitioner do not fully and accurately portray the true factual and legal situation.

Both questions are essentially the same in substance, Number 1 referring to the School Mercantile Tax Act, No. 320, of June 20, 1947, P.L. 745, made permanent upon re-enactment in 1949; whereas Number 2 relates to the City Mercantile Tax Ordinance, No. 488 of December, 1947, enacted under authority of the Pennsylvania Municipal Enabling Act of June 25, 1947, P.L. 1145. Except for two differences in the provisions of the Act and Ordinance which are in no respect material to the issues herein raised, the two enactments are substantially identical.

The School Mercantile Tax Act contains the following provisions pertinent to the instant issues:

> "Section 2. Authority to Levy and Collect Tax; Use of Tax. — For the year one thousand nine hundred forty-eight and annually thereafter, every school district of the first class shall issue mercantile licenses and levy and collect an annual mercantile license tax in the manner and at the rates hereinafter set forth."

Section 2 of the City Mercantile Tax Ordinance is the same.

"Section 3. License Fees. — Beginning in the year one thousand nine hundred forty-eight, and annually thereafter, every person desiring to continue to engage in, or hereafter to begin to engage in, the business of wholesale or retail vendor of, or dealer in, goods, wares and merchandise and broker conducting a restaurant or other place where food, drink or refreshments are sold, or place of amusement in a school district of the first class, shall on or before the first day of January of each license year, or prior to commencing business in any such license year, procure a mercantile license for his place of business, or if more than one, for each of his places of business in the school district from the receiver of school taxes or school treasurer, who shall issue the same upon the payment of a fee of two dollars ($2) for a wholesale license or a retail license, and four dollars ($4) for a wholesale and retail license for his place of business, or if more than one, for each of his places of business in the school district for each license year. Such license shall be conspicuously posted at the place of business or each of the places of business of every such person at all times."

Section 3 of Mercantile Tax Ordinance is identical.

"Section 12 * * *

(b) Nothing contained in this act shall be construed to empower any school district of the first class to levy and collect the taxes hereby imposed on any person or on any business or any portion of any business not within the taxing power of this

Commonwealth under the Constitution of the United States.

"(c) If the tax, * * * or any portion of the tax imposed upon any person under the provisions of this act shall be held by any court of competent jurisdiction to be in violation of the Constitution of the United States, or of the Commonwealth of Pennsylvania, the decision of the court shall not affect or impair the right to impose the taxes, or the validity of taxes so imposed upon other persons as herein provided, or to impose the taxes so excepted from imposition. It is the intent of the General Assembly that the taxes imposed or excepted, so held to be unconstitutional, were not to be imposed or excepted, but that the remainder of said taxes imposed hereunder were to be imposed and collected and the taxes so excepted were to be imposed."

These provisions appear in Section 11 of the Mercantile Tax Ordinance.

When the questions presented (Petition, page 11) are compared with paragraphs (1) and (2) of the Petition, the bases of the questions presented become evident. It is made to appear that the court below, without more, upheld the tax as applied to Petitioner notwithstanding the sales were made in interstate commerce. This is an unwarranted conclusion.

It is important to note *who* is taxed and *what* is taxed. The impact of the tax imposed by the Act and the Ordinance is on *dealers or vendors*. It is an excise tax based on the *privilege of selling* within the territorial jurisdictions of the School District and the City, which

are co-terminous. *Puntureri v. School District of Pittsburgh,* 359 Pa. 596, 60 A. 2d. 42 (1948).

Petitioner is located, and exercises the privilege of selling within the territorial limits of both Respondents, where it enjoys and may claim all the privileges, protection and benefits within the power of either Respondent to confer. The two customers of Petitioner, transactions with whom are involved exclusively in the instant case, are likewise and similarly located and doing business in Pittsburgh. All details, except physical delivery, of *selling* and *buying* non-ferrous metal between Petitioner and these customers were negotiated and determined in Pittsburgh. Thus the "privilege of selling", *the thing taxed,* was completely consummated, irrespective of actual physical delivery, in the Pittsburgh offices of Petitioner and its customers. Such local transactions and contracts are not in the least affected by the fact that the customers wanted and purchased refined non-ferrous metal, which Petitioner did not have here and could not deliver without first purchasing proper scrap and arranging for its refinement. They are equally unaffected by the fact that Petitioner acquired such scrap either within or without Pennsylvania and ordered it delivered to Cartaret, New Jersey, for assaying and refinement prior to delivery to the customer. It all adds up to a transaction in the course of exercising the privilege of selling — the only thing taxed as measured by the gross receipts therefrom — initiated, negotiated and concluded within the territorial limits of the School District and City of Pittsburgh. Only the transportation of the scrap occurs elsewhere: where initiated in another State and coming to rest in New Jersey, it may never be any where, any time, in Pennsylvania.

The true question then emerges: where the selling transaction (the thing taxed) is made in such complete and exclusively local fashion though accompanied by undoubted interstate transportation of goods probably never in Pennsylvania, are the receipts therefrom not "within the taxing power of this Commonwealth under the Constitution of the United States"?

The gist of Petitioners' argument is now, as it was in the courts below, that any gross receipt tax based on transactions *touched* by inter-state commerce in any manner is *per se* invalid, relying on *Crew Levick Co. v. Pennsylvania,* 245 U.S. 292 (1917), *Gwinn-White and Prince v. Henneford,* 305 U.S. 439 (1939), *J. D. Adams v. Storen,* 304 U.S. 307 (1938) and *Freeman v. Hewit,* 329 U.S. 249 (1947). When the *facts* rather than isolated *statements* in those opinions are properly discerned, it is clear as the Supreme Court of Pennsylvania found, *Keystone Metal Co. v. City of Pittsburgh,* 374 Pa. 323, 97 A.2d. 797 at page 801, that these

> "were all cases in which the sellers and the buyers were from *different* states, and the transactions involved the *negotiation of business* across State lines. Obviously in those situations there were not *sufficient local incidents* to support the tax." (Emphasis supplied).

At the same time the Court below found, 97 A.2d. 707 at page 800, that in the instant case

> "The consummation of these entire transactions, with the sole exception of delivery, was within the borders of Pennsylvania."

Of necessity, State and Federal taxation, in so far as it concerns commerce among the States, must intersect at some point, inasmuch as they do not move in "wholly different orbits"; *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 329, 64 S. Ct. 1023 (1944).

Furthermore, Petitioner's argument before the trial court, the court *en banc*, and the Supreme Court of the State, if not now, has asserted at least by inference that the tax under the Mercantile Tax Act, and the Ordinance, is void as being measured by unapportioned gross proceeds of sales in interstate commerce. That argument misses the issue. Apportionment or non-apportionment is not involved. There is nothing on which apportionment can operate. In this case, as in others, Respondents do not impose the tax in situations where it would be a direct tax on, or discrimination against, interstate commerce. There has been no attempt to tax Petitioner's sales or other activities outside of Pennsylvania. Had Petitioner's customers been in Ohio or New Jersey, and not in Pittsburgh, Respondents would readily have treated Petitioner as exempt, as is done in countless other instances.

4. Petitioner does not present a federal question of substance which has not heretofore been determined by this Court.

Conceding readily that a *direct* tax on gross receipts from interstate commerce is invalid as is a tax *discriminating against* interstate commerce, Respondents urgently submit that the School District and City mercantile taxes are not subject to challenge on either ground. Their impact on interstate commerce is in no sense direct;

neither do they in any sense whatsoever discriminate either in favor of local commerce or against interstate commerce. As shown above, the *thing taxed* is nothing but the *exercise in* the coterminous territorial jurisdictions of the School District and the City of the *privilege of selling*. The exercise of that privilege *outside* of those limits—in any suburb, in Allegheny County and in the State—is not within Respondents' reach. But where the exercise of that privilege *within* those limits results in gross receipts from customers *outside* of those limits, such receipts are within Respondents' tax reach, even though interstate commerce is incidentally involved. If in this situation the taxes complained of are direct or discriminatory with respect to interstate commerce, Petitioner has failed all along to prove it, notwithstanding the burden of proof rests heavily upon it. It is hornbook law that tax statutes must be strictly construed against him who challenges it. *Capital Greyhound Lines v. Brice*, 339 U.S. 542, 70 S. Ct. 806, 810.

Petitioner has at no time—and has not now—invoked the principle of due process. It now rests its argument on the proposition that the State Supreme Court erred by ruling the taxes as imposed to be valid, because, I, not *prohibited* by Article I, Section 8 of the Constitution of the United States (Petition, page 17); II (page 22) that local taxation of gross receipts from sales in interstate commerce is unconstitutional *only* where such interstate sales *are taxable* by other states; and III (page 25) that the Commerce Clause does not prohibit local taxation *merely* because intra-state activities have *incidental interstate attributes*. Respondents submit that Petitioner's analysis of the opinion of the State Supreme Court fails to

comprehend the true and complete *ratio decidendi* of that unanimous Court.

a. *The Commerce Clause does not prohibit the tax imposed under the Mercantile Tax Act or the Mercantile Tax Ordinance.* On its face the Commerce Clause simply reads "the Congress shall have power * * * to regulate commerce * * * among the several states." (Article I, Section 8, Clause 3). Respondents recognize the statement in *Freeman v. Hewit, supra,* to the effect that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the states, but by its own force created an area of trade free from interference by the states, so that the Commerce Clause, even without implementing limits by the Congress, is a limitation upon the power of the states. Nevertheless, this Court has recognized in numerous instances that a state tax may be valid provided it does not discriminate against, cast an undue burden upon, or, interfere directly with interstate commerce. While interstate commerce, as such, may not be discriminated against, it need not, on the other hand, be actively favored at the expense of local trade. All who share the protection and benefits of government may be asked to contribute uniformly to its upkeep. The State Supreme Court, recognizing the effect of the case of *Freeman v. Hewit, supra,* nevertheless held that if it is applied, it would, in this case, support the validity of the tax. Respondents submit that if a new rule prohibiting the imposition of these mercantile taxes consistent with Petitioner's contentions is to be declared, Congress should do it. *Capital Greyhound Lines v. Brice, supra.* This Court also stated in *Freeman v.*

Hewit decision that "Courts are not possessed of instruments of determination so delicate as to enable them to weigh the various facts in a complicated economic setting which, as to an isolated application of a state tax, might mitigate the obvious burden generally created by a direct tax on commerce." What this Court said in these words might equally well apply with respect to the burden upon interstate commerce which is not direct or discriminatory.

The basic meaning of the commerce clause has been phrased by the United States Supreme Court time and time again. The following expressions, from cases involving taxes of like operating incidence as the tax imposed by the Act and Ordinance here challenged, are typical:

> "But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing business, *Western Livestock v. Bureau of Revenue,* 303 U.S. 250, 254, 58 S. Ct. 546 * * * Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless falls short of the regulation of the commerce which the Constitution leaves to Congress." *McGoldrick v. Berwind-White Coal Mining Co., supra,* 60 S. Ct. at p. 392, 309 U.S. 33 at page 46, 47.

"* * * neither the Commerce Clause or the Fourteenth Amendment prevent the imposition of tax on receipts from an intrastate transaction even though the total activities from which the local transaction derives may have incidental interstate attributes." *International Harvester Co. v. Department of Treasury, supra,* 64 S. Ct. at p. 1021, 322 U.S. 340 at page 344.

b. *Interstate Commerce may be made to pay its own way.*

(1) RESPONDENTS SUBMIT THAT THE SUPREME COURT OF PENNSYLVANIA PROPERLY DECIDED THIS QUESTION, NOT *merely* AS THE BASIS OF ITS DECISION IN THE CASE, BUT AS *one vital* FACTOR ALONG WITH OTHERS, WHEN IT SAID INTER ALIA, AT PAGE 799 OF 97 A. 2d, 797, WITH REFERENCE TO LOCAL INCIDENTS:

"(1) While it is quite clear that a direct State tax upon the privilege of conducting interstate commerce is invalid, Freeman v. Hewit, 329 U.S. 249, 67 S. Ct. 274, 91 L.Ed. 265; Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422, 67 S. Ct. 815, 91 L.Ed. 993; Spector Motor Service, Inc., v. O'Connor, 340 U.S. 602, 71 S. Ct. 508, 95 L.Ed. 573, it has also been held by the Supreme Court of the United States that, although a transaction viewed as a whole may be one in interstate commerce, there may be certain "intrastate events", Southern Pacific Co. v. Gallagher, 306 U.S. 167, 176, 59 S. Ct. 389, 83 L.Ed. 586, or "local activities", McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 58, 60 S. Ct. 388, 84 L.Ed. 565, in connection therewith that permit the

imposition of a State tax. Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 58 S. Ct. 546, 82 L.Ed. 823; International Harvester Co. v. Department of Treasury, 322 U.S. 340, 64 S. Ct. 1019, 88 L.Ed. 1313; Norton Company v. Department of Revenue of Illinois, 340 U.S. 534, 71 S. Ct. 377, 95 L.Ed. 517."

Emerging from the above citations and from many decisions of this Court which are of necessity divergent by reason of differing facts, it is crystal-clear upon proper analysis that the mere presence of interstate commerce —flow of goods across state lines—is neither decisive nor controlling in tax cases. The Commerce Clause has not been construed to prohibit states from making such commerce "pay its own way"—provided adequate local events or incidents to support the tax are present and if the tax does not discriminate against or otherwise burden such commerce.

That there are adequate local incidents or events to support the instant mercantile taxes has been adequately demonstrated, *supra*. In considering applicable decisions to support Respondents' contention that there are adequate local events distinct from interstate commerce to support the tax against Petitioner, Respondents suggest that the only cases directly in point are those where the thing taxed, or the privilege exercised, occurs in the taxing state, but some feature or the culmination of the underlying transaction occurs elsewhere.

Illustrative of this line of cases is the leading case of *Western Livestock v. Bureau of Revenue, supra*. The case involved a New Mexico privilege tax on gross receipts. The plaintiff printed a magazine in New Mexico.

Solicitation and circulation distribution were both in and out of New Mexico. Total receipts from both in and out of state sources were taxed by New Mexico. The Court in sustaining the tax held that the tax in form and substance was conditioned on local happenings, the local carrying on of printing and publishing. It noted that the tax could neither in form nor substance be repeated by another state so as to lay an added burden on interstate commerce. The Court said *inter-alia*:

> "It is not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of the state tax burden even though it increases the cost of doing business. 'Even interstate commerce must pay its own way' * * * and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business. In the present case the tax is, in form and substance, an excise conditioned on the carrying on of a local business." 303 U.S. at pp. 254, 257.

State of Wisconsin, et al., v. J. C. Penney Co., supra, also is characteristic of the line of cases where the underlying transaction taxed is concerned incidentally with events occurring without the taxing state. The case involved a Wisconsin state tax on the "privilege of declaring and receiving dividends out of income derived from property located and business transacted in Wisconsin." In respect to foreign corporations, as was the Penney Company, which had stores both in and out of Wisconsin, the law provided an allocation formula. The Penney Company declared dividends and drew dividends checks at its New York office. Since these events

occurred outside of Wisconsin, Penney contended that the dividends were protected by the commerce clause and that Wisconsin had no power to tax. In upholding Wisconsin's right to tax, this Court held that the tax in its measure and incidence was related to Wisconsin transactions even though contingent on events occurring elsewhere. The Court grounded its decision on the due process clause:

> "We cannot, however, be too often reminded that the limits on the otherwise autonomous powers of the states are those in the Constitution and not verbal weapons imported into it. 'Taxable event', 'jurisdiction to tax', 'business situs', 'extraterritoriality', are all compendious ways of implying the impotence of state power because state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demands of the exaction upon happenings outside its own borders. The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a

state for which the tax is an extraction." 61 S. Ct. at p. 250, 311 U.S. 435, at pages 444 and 445.

Much in the same tenor as respecting a state's right to tax its residents measured by receipts from transactions occurring both with and without the taxing state is *Lawrence v. State Tax Commission,* 286 U.S. 276 (1932), a case relied on in the Penney decision.

Respondents submit that the Western Livestock and Penney cases are applicable in principle to the present situation. While the Penney case might be distinguished as involving an allocation formula, that feature is not material. The allocation merely confined Wisconsin's reach to its grasp. As involves Petitioner herein, no allocation was necessary. All of Petitioner's sales were in Pennsylvania. It had no place of business elsewhere. The nature of the tax and the situation of the parties did not call for tax apportionment: *Interstate Oil Pipe Line Co. v. Stone,* 337 U.S. 662, 69 S. Ct. 1264.

(2) THE STATE SUPREME COURT PROPERLY HELD THAT NO TAX UPON THE TRANSACTION BY ANY SISTER STATE WOULD BE IN ANY WAY RELATED TO THE SALES TRANSACTIONS BETWEEN PETITIONER AND ITS CUSTOMERS, UPON WHICH ALONE THE INSTANT TAXES ARE BASED. No tax by another State could, therefore, duplicate the tax or place an additional, discriminatory or undue burden upon interstate commerce.

It is recognized that any tax which in any way affects interstate commerce is a burden thereon to some extent. The test of the validity of a state tax statute in respect both to what it provides and to the construction and application thereof is whether or not such

burden is direct, discriminatory or undue. Respondents submit that the instant tax burdens are neither. We have discussed above the complete lack of discrimination and the incontrovertible presence of adequate and recognized local incidents.

No further discussion appears to be necessary to demonstrate that the challenged taxes are completely local in their impact upon the privilege of selling, are not directed against interstate selling, and as such cannot possibly be duplicated by any other State. Petitioner, however, contends that under *Freeman v. Hewit, supra,* the State Supreme Court erred in its application of the multiple burden theory. It is submitted that the answer of the State Supreme Court, *supra,* page 801 of 97, A. 2d, 797, effectively refutes Petitioner's contention. When, however, Petitioner says that this Court, in 1946, "put an end to the multiple burden theory" in *Freeman v. Hewit, supra,* it makes a statement that demands further scrutiny and is not substantiated by later decisions by this Court.

The multiple burden theory, first advanced in *Western Live Stock v. Bureau of Revenue, supra,* in 1938, runs as a consistent thread tying together the decisions of this Court since that time. While the language in the majority opinion in *Freeman v. Hewit, supra,* tempers somewhat the multiple burden theory, it does not "put an end to" the theory. The decision in that case recognized the theory and is consistent with it, as Mr. Justice Rutledge noted in his concurring opinion.

In *Freeman v. Hewit, supra,* Indiana was denied the right to tax receipts from a transaction in which an *Indiana seller* sold securities through the New York

Stock Exchange to a *buyer in New York.* Obviously New York, the State where the securities were delivered to a *resident buyer,* could tax the transaction by taxing the buyer; consequently Indiana was denied the right to tax. This affirms the well recognized proposition that *as between* the *state of the seller* and the *state of the buyer,* the latter state *can impose* a gross receipts tax. In the instant case seller and buyer are not *in two different states;* they are *in the same state.* The matter of *residence,* contrary to Petitioner's contention, in one breath, that it is of *no importance* and in the next breath, it is of *only limited importance,* is *all important* in matters of *commerce among states.*

Later decisions of this Court do not accept the *Freeman v. Hewit* decision as the death knell of the multiple burden theory. If so, how can one explain the decision in *Interstate Oil Pipe Line Co. v. Stone,* 337 U.S. 662, 69 S. Ct. 1264, 1267, wherein, in 1949, this Court sustained the tax there challenged because, *inter alia,* "no other state can repeat the tax"? In that case the tax was imposed on the gross receipts of an *intrastate* pipe line used in transporting oil into *interstate* commerce, all activities were carried on in Mississippi, and the tax did not discriminate against interstate commerce in favor of intra-state commerce of like character.

Norton v. Department of Revenue of Illinois, 340 U.S. 534, 71 S. Ct. 377, in 1951 construed the Illinois Retail Occupation Tax, which in *every material respect* is identical with the Mercantile Taxes now challenged by Petitioner. There the tax was on the *occupation* of *vendor,* was *measured* by *gross receipts,* and *"business in interstate commerce" was specifically exempted;*

exactly the same as in the Act and Ordinance now challenged. In the Norton case, the transactions involved were held to be either wholly taxable or wholly exempt under the commerce clause. As to those ruled exempt, this Court (the majority) said:

> "The only items that are so clearly interstate in character that the State could not reasonably attribute their proceeds to the local business are orders sent directly to Wooster (Massachusetts) by the customer and shipped directly to the customer from Wooster." 71 S. Ct. page 381, 340 U.S. 534, at page 539.

The minority opinion of this Court — Reed, J. and concurred in by Black and Douglas, J.J. — dissented solely on the ground that even those transactions were taxable.

The Norton opinion thus not only establishes the fact that a State tax identical with the taxes herein under attack *has been upheld as valid* under the commerce clause and that this Court *has decided* the very issues involving statutory provisions and facts identical with those in the instant case, of which more, *infra*. Of particular interest for the moment, however, it is to be noted that the multiple burden theory was still very much alive in that decision.

(3) THE QUESTIONS RAISED BY PETITIONER ARE NOT OF FIRST IMPRESSION IN THIS COURT.

Even if no case arising out of the identical facts had been presented to this Court, it could not be contended seriously that the identical issues have not been considered. Many decisions by this Court, including

cases cited above, have ruled upon questions of discrimination against interstate commerce, undue burden thereon, the significance of local incidents and the power, or the lack of it, by other states to duplicate the challenged tax of another state. But, as reference above to *Norton v. Department of Revenue, supra, Freeman v. Hewit, supra, Western Live Stock v. Bureau of Revenue, supra, Interstate Oil Pipe Line Co. v. Stone, supra,* and *Spector Motor Service v. O'Connor,* 340 U.S. 602, 71 S. Ct. 588 — particularly the Norton case — demonstrate, not only the identical issues, but the identical facts have been ruled upon by this Court.

For further emphasis upon this question, *International Harvester Company v. Department of Treasury,* 322 U.S. 340, 64 S. Ct. 1019, is directly in point. Indiana's gross income tax law is comparable to the Act and Ordinance herein challenged. It provides a "privilege tax on gross income" or upon "gross receipts from commerce". The receipts came from transactions (a) in which customers, whether in Indiana or elsewhere, took delivery in Indiana from Indiana factories, and (b) also included transactions in which the goods to fill orders of Indiana were shipped into Indiana from other states. With reference to the second category, this Court said:

> "* * * where a state seeks to tax receipts from interstate transactions consummated within its borders, its power to do so cannot be withheld on constitutional grounds where it treats wholly local transactions in the same way." 64 S. Ct. at page 1023, 322 U.S. 340 at page 349.

This aptly describes the taxes herein challenged. See also *Central Greyhound Lines v. Mealey,* 334 U.S. 658,

68 S. Ct. 1263 (1948), *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, *Gwin, White & Prince v. Henneford*, 305 U.S. 434, 59 S. Ct. 325, *Robertson v. People of State of California*, 328 U.S. 440, 66 S. Ct. 1160.

On February 9, 1953, this Court rendered an opinion which so far as we can determine is the most recent case upon this subject. That case was *City of Chicago v. Willett Co.*, ... U.S. ..... 73 S. Ct. 460. This opinion indicated that Mr. Justice Frankfurter, the writer of the majority opinion in the *Freeman v. Hewit* case, did not go as far from the trend of other decisions as Petitioner contends. Speaking for the majority of the Court in the Willett Co. case, Mr. Justice Frankfurter states, *inter alia*: "Once more we are called upon to pass on the validity of a tax which falls in some measure upon commerce 'among the several states'. * * * 'It being once admitted, as of course it must be, that *not every law that affects commerce among the states is a regulation of it in a constitutional sense,* nice distinctions are to be expected'. (cases cited) * * * The central and decisive fact in this case is that Respondent's business has, as much as any transportation business can have, a home. That home is Chicago. To the extent that Respondent's business is not confined within the City's limits, it revolves around the City. * * * In the circumstances, a tax of reasonable proportions such as the one in question not shown in fact to be a burden on interstate commerce, is not inconsistent with the Commerce Clause." 73 S. Ct. at pp. 461, 463 (Emphasis supplied)

Conclusion.

Respondents submit, therefore, that Petitioner has presented no sound or conclusive reason on jurisdictional grounds or on the merits why this Court should grant the requested writ for certiorari. No special or compelling reason has been shown for this Court to deviate from its rule of exercising its discretion to grant writs of certiorari sparingly. The questions raised in the petition have both in principle and on the facts been decided by this Court in numerous instances, so that the law controlling the issues raised in the petition are well established. Respondents submit that the law so established is adverse to Petitioner and that, therefore, the instant petition for a writ of certiorari should be denied forthwith.

Respectfully submitted,

ANNE X. ALPERN,
Solicitor,
City of Pittsburgh.

J. FRANK MCKENNA, JR.,
Assistant Solicitor,
City of Pittsburgh.

MORTIMER B. LESHER,
Solicitor,
School District of Pittsburgh.

OSCAR G. PETERSON,
Assistant Solicitor,
School District of Pittsburgh.

NILES ANDERSON,
Assistant Solicitor,
School District of Pittsburgh.